Supreme Court, U.S.
FILED
MAY 12 1992
OFFICE OF THE CLERK

(3)

No. 91-1035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES L. BUSSEY, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

BYRON FOX
FOX & PARTEE
Petitioner's Counsel of Record
4600 Madison, Suite 1010
Kansas City, Missouri 64112
(816) 531-3500

Of Counsel
CARL W. BUSSEY
906 Grand, Suite 1031
Kansas City, Missouri 64106
(816) 474-3440

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTIONS PRESENTED

I

DOES A TRIAL COURT ABUSE ITS DISCRETION AND VIOLATE AN ACCUSED'S FIFTH AND SIXTH AMENDMENT CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, WHEN THAT TRIAL COURT GIVES THE JURY THE *JEWELL* OR OSTRICH INSTRUCTION THAT REDUCED THE STATUTORILY PRESCRIBED AND JUDICIALLY APPROVED SPECIFIC INTENT STANDARD OF WILLFULNESS IN FELONY CRIMINAL TAX CASES TO A SHOULD-HAVE-KNOWN STANDARD OF NEGLIGENCE?

II

WHERE AN ACCUSED IS CHARGED WITH FELONY CRIMINAL TAX OFFENSES AND THE GOVERNMENT FAILS TO PROVE ANY AFFIRMATIVE ACT CONDUCT ON THE PART OF THE ACCUSED, DOES THE TRIAL COURT ABUSE ITS DISCRETION AND VIOLATE THE ACCUSED'S FIFTH AND SIXTH AMENDMENT CONSTITUTIONAL RIGHTS TO A FAIR TRIAL BY NOT GRANTING A JUDGMENT OF ACQUITTAL?

III

DOES A TRIAL COURT ABUSE ITS DISCRETION AND VIOLATE AN ACCUSED'S FIFTH AND SIXTH AMENDMENT CONSTITUTIONAL RIGHTS TO A FAIR TRIAL WHEN IT LIMITS THE ACCUSED'S ABILITY TO PRESENT EVIDENCE OF A LACK OF WILLFULNESS AS A DEFENSE BASED ON FEDERAL RULE OF EVIDENCE 608(b), IN FELONY CRIMINAL TAX CASES REQUIRING THE GOVERNMENT TO PROVE WILLFULNESS BEYOND A REASONABLE DOUBT?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Statement	2
Reply to Respondent's First Argument	2
Reply to Respondent's Second Argument	8
Reply to Respondent's Third Argument	10
Conclusion	10

TABLE OF AUTHORITIES

Page(s)

Cases:

County Court of Ulster v. Allen, 442 U.S. 140 (1979) 6

Leary v. United States, 395 U.S. 6 (1969) 4

Mattingly v. United States, 924 F.2d 785 (8th Cir. 1991)..... 5

Spies v. United States, 317 U.S. 492 (1943) 8

Tomala v. United States, No. 97-7051 (March, 1992).. 2,3,4, 5,7

United States v. Abel, 469 U.S. 45 (1984) 10

United States v. Hiland, 909 F.2d 1114 (8th Cir. 1990).... 4

Statutes and Rule:

21 U.S.C. Section 881 7

28 U.S.C. Section 1254(1) 1

Fed. R. Evid. 608(b) i

No. 91-1035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES L. BUSSEY, JR.,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The Opinion of the Eighth Circuit Court of Appeals (Pet. App. A1-A25) is reported at 942 F.2d 1241. The opinion of the District Court (Pet. App. A26-28) was not reported.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on August 20, 1991; a rehearing was sought and denied on September 23, 1991. The petition for a writ of certiorari was filed on December 23, 1991. The brief for the United States in

opposition was filed on April 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT

Petitioner filed a petition for a writ of certiorari on December 23, 1991. Thereafter, Respondent filed a brief for the United States in opposition on April 10, 1992. Petitioner is filing this reply to Respondent's brief in opposition. However, Petitioner refers this Honorable Court to his petition for a writ of certiorari as containing the reasons why said petition should be granted, and in this reply will seek to address and point out to this Court the errors in reasoning and fact contained within the Argument portion of Respondent's brief in opposition.

REPLY TO RESPONDENT'S FIRST ARGUMENT

a. In its brief for the United States in opposition, Respondent United States of America argues that Petitioner's petition for a writ of certiorari before this Honorable Court should be denied. Petitioner's stated reason for requesting certiorari is because of the disagreement and confusion throughout the federal court circuits as to the propriety of the giving of the *Jewell* instruction[1] and the resulting need for guidance from this Court (Pet. 6-18). Respondent agrees that there is indeed conflict and disagreement. Resp. 13-15. Respondent asserts that no conflict exists as to the *Jewell* instruction given to the jury in this case. This, even though Respondent acknowledges that it recently asked this Court to grant the petition for a writ of certiorari filed in *Tomala v. United States,* No. 97-7051 (March, 1992), in order to resolve the conflict over the issue of the giving of the *Jewell* instruction. Resp. 14, note 6.

---

[1] The *Jewell* instruction has also been referred to throughout the circuits as the "deliberate indifference" instruction, the "conscious avoidance" instruction and the "ostrich" instruction.

On page 14 of its brief in *Tomala, id.*, Respondent states:

> In sum, we agree with petitioner that the circuits are in conflict concerning whether an instruction such as the one given in this case properly defines "knowledge" for purposes of the criminal law and thus can properly be given whenever knowledge is an issue in a criminal case. Since the issue arises quite frequently, further review by this Court to resolve the conflict is warranted.

In simultaneously arguing that Petitioner's petition for a writ of certiorari should be denied (Resp. 19) while at the same time having argued only a month ago in *Tomala* that the writ sought therein should be granted, Respondent is engaging in the highest form of hypocrisy.

There are striking similarities between the *Tomala* case and the present case of *Bussey v. United States*. While the accused was charged with illegally importing cocaine into the United States in *Tomala*, the defendant therein testified that she was given the suitcase containing said drugs by another party for delivery to a third party and did not have any knowledge that the suitcase contained drugs. The *Jewell* instruction given to the jury in that case was:

> However, it is not necessary for the government to prove to an absolute certainty that [petitioner] knew that she possessed narcotics. [Petitioner's] knowledge may be established by proof beyond a reasonable doubt that [petitioner] was aware, was aware of a high probability that the suitcase contained narcotics unless, despite this high probability, the facts show that [petitioner] actually believed that the suitcase did not contain narcotics.

Tomala 12/4/90 Tr. 438-439.

In Petitioner herein's case, the form of the *Jewell* instruction given to the jury read:

> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of that fact.
>
> It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

Pet. App. A8.

The definition of "knowledge" contained within Section 2.02(7) of the Model Penal Code, and approved by this Court in *Leary v. United States,* 395 U.S. 6, 46 n.93, states that "[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, *unless he actually believes that it does not exist*" (emphasis added).

This definition of knowledge, or form of the *Jewell* instruction containing the above-emphasized limiting clause, was the form approved by this Court in *Leary, id.,* given in *Tomala,* and supported as correct by Respondent.[2] But in two recent cases from the Eighth Circuit, it was held that said limiting phrase of "unless he actually believes that it does not exist" is not required. In *United States v. Hiland,* 909 F.2d 1114 (8th Cir. 1990), the court wrote:

> We reject [appellant's] assertion that [a willful blindness] instruction must specifically state that a defendant has

[2] *See* the government's brief in *Tomala* at 9, 13, where Respondent argues that the form of the instruction used in *Tomala* is correct.

> knowledge of a certain fact only if he is aware of a high probability of its existence, unless he actually believes that it does not exist. *Although the Second Circuit has taken this position . . . our decisions have not required the inclusion of such language in a willful blindness instruction.*

909 F.2d at 1130 (emphasis added, citations omitted). *See also Mattingly v. United States*, 924 F.2d 785, 792 (8th Cir. 1991), in which the unconscious avoidance instruction was allowed absent the limiting clause.

In both *Tomala* and *Bussey*, the *Jewell* instruction that was given permitted each respective jury to find knowledge based upon "conscious avoidance". This in effect shifts the burden of proof to the defendant, for the prosecution need only show that the defendant recognized the likelihood of a particular fact through circumstantial evidence. The instruction given in *Tomala*, although shifting the burden of proof, at least contains the "unless" or limiting clause which permits a jury to find a lack of knowledge despite a high probability of knowledge if facts may show that the defendant still believed otherwise. In Petitioner's case, there was not any limiting instruction given. This would at least have allowed a jury not to find knowledge based upon a theory of conscious avoidance if there was evidence that despite any high probability of an intent to avoid enlightenment, facts showed Petitioner not to have actually believed that he was willfully and knowingly subscribing to a false tax return. The presence of the "unless" clause would have highlighted the importance of Petitioner's actual state of mind, thereby minimizing the risk that the "high probability" language would cause the jury to convict him even though he held an honest contrary belief.

If neither subjective certainty nor objective confirmation can be proven, the conviction violates Petitioner's constitutional rights as Respondent had not met its burden of proving Petitioner's knowledge.

b. Respondent also raises the issue of permissive inference as interpreted by the case of *County Court of Ulster v. Allen*, 442 U.S. 140 (1979), in an effort to argue that the giving of the *Jewell* instruction is not reason for the granting of Petitioner's Petition for a writ of certiorari. Resp. 10. However, the conscious avoidance instruction is not "some" fact presented to a jury with a defendant having an opportunity to challenge it. Indeed, the conscious avoidance instruction is a *mandatory* instruction to the jury. Therefore, and given the *County Court of Ulster v. Allen* case, *id.*, said instruction must be viewed in light of its mandatory presumptive nature. As to a viewing in that light, the *Ulster* Court stated as follows:

> A mandatory presumption is a far more troublesome evidentiary device. For it may affect not only the strength of the "no reasonable doubt" burden but also the placement of that burden; it tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. (Citations omitted.)

Id. at 157.

This argument set forth in *Ulster* above is entirely consistent with Petitioner's argument that the giving of the *Jewell*, or conscious avoidance, instruction shifts the burden of proof to a defendant. Pet. 13-17. The basic question would be one of "How does the unproven allegations cited by the government[3] relate to a claim of willfully subscribing to a false tax return?" Even assuming that such allegations had been proven, they do not mandate a finding of the unrelated commission of the offenses

---

[3] The Respondent continues to argue in its Statement of Facts and elsewhere that Petitioner's accountant informed him that his tax returns would have to be amended. As Petitioner will demonstrate hereafter, that and similar accusations that Respondent represents as fact were not proven at trial.

charged. The objective and independent evidence suggests that the accountant Steiner *did not tell* the Petitioner of the need for filing an amended Schedule K-1. He (Steiner) *did not "clear"* the item regarding an amended Schedule K-1 as required by generally accepted accounting principles. Moreover, both Steiner and one of Steiner's accounting partners approved the 1981 tax return as it was then prepared for mailing to the Internal Revenue Service.

c. There is mass confusion and disagreement between, throughout and within the federal circuits as to the giving of the *Jewell* instruction, the form to be given, and in what type cases it should be given. Congress has specifically approved the giving of the *Jewell* instructions, but only in civil forfeiture cases under the Comprehensive Drug Abuse Prevention and Control Act of 1970.[4] The burden of proof that has to be met by the government in seeking a criminal conviction is still one of "guilt beyond a reasonable doubt". As argued in Petitioner's petition for writ of certiorari, the giving of the *Jewell* instruction relieves the government of that burden and should, therefore, not be permitted. Pet. 6-19.

Respondent admits to the confusion and disagreement concerning the giving of the *Jewell* instruction. Resp. 14, note 6. But Respondent is in error in arguing against the granting of Petitioner's petition for writ of certiorari. Petitioner respectfully suggests that the instant case presents the issues of the propriety of the giving of the *Jewell* instruction and in what, if any, form it is to be given in equal or greater importance and relevance than does the *Tomala* case.

While the Respondent agrees that there must be guidance from the Supreme Court of the United States as to what constitutes knowledge in a drug trafficking case, there must also be

---

[4] Section 511; 21 U.S.C. Sec. 881.

guidance as to what is "knowledge" and willfulness and knowledge in subscribing to a false tax return. Constitutional rights have been circumscribed in drug trafficking cases due to the severity of the problem and its threat to the very existence of our society. Not all of our citizens are criminals who will one day deal in drugs. But they are all subject to our complicated tax reporting laws, which should be uniform and apply equally irrespective of the federal circuit in which he or she may be prosecuted for their alleged violation. This Court must clear the confusion and issue its definitive decision as to if, and under what circumstances, the giving of a *Jewell* instruction is proper in any tax case. The decision of no other court can suffice.

REPLY TO RESPONDENT'S SECOND ARGUMENT

In attempting to address Petitioner's argument that the government in this case had failed to prove any affirmative act conduct on his part which must be proven for a conviction (Pet. 1922), Respondent argues that the government was not required to prove any acts of affirmative conduct as set forth, or similar to that set forth, in *Spies v. United States*, 317 U.S. 492 (1943) (Resp. 15-16). Petitioner suggests that *Spies* speaks for itself. Something more than a mere failure to file a tax return or to pay a tax was required for the government to obtain a conviction for willfully and knowingly subscribing to a false tax return. In *Spies*, this Court held that this "something more" was an affirmative action, i.e., "some willful commission in addition to the willful omissions that make up the list of misdemeanors." *Id.* at 499.

Respondent argues that the government was not required to prove some affirmative act conduct as dictated in *Spies*. It then "backtracks" on its position somewhat and acknowledges that proof of affirmative acts were required for the conviction(s) in the instant case. Respondent contends that although willfulness and knowingly subscribing to a false tax return are affirmative acts that must be proven, such acts were proved by the evidence. Resp. 16. As to that proof, Respondent misstates that Petitioner's

1981 tax return preparer (Irl Steiner) had requested that Petitioner provide to Steiner an amended Schedule K-1 but that Petitioner had not done so. (*See* Resp. 17.)

These representations throughout Respondent's brief of Petitioner's accountant having informed Petitioner as to errors within the Schedules K-1 and the need for Petitioner to amend the same, are not true. They are misrepresentations. The single truth is that the prosecutor at Petitioner's trial made the statement as to Steiner having informed Petitioner of the need to obtain amended Schedules K-1 in his closing argument. The Court of Appeals in Petitioner's case, while also referring to such claimed testimony as most critical, does not cite any actual transcript page for the actual source of same, *because that testimony does not exist.*

In response to a direct question by the Respondent as to whether Steiner had explained to Petitioner the need for an amended K-1, Steiner responded that:

> I believe I indicated that with the 87 thousand included, it would result in additional taxes that he owed at that particular point. We may — and I don't recall at this point — we may have computed it within that, with it.

Trial Tr. 3-188.

In response to a similar question upon cross examination of "Now, do you recall at what point you did make the suggestion to him to seek a correction of the K-1?", Steiner responded as follows:

> I would believe that I would do this with any person's return, if the information was incorrect or been informed of it at that time, would have informed the taxpayer to have the item corrected and —

Trial Tr. 3-248.

Respondent also states that although Steiner had conceded that he had not checked off the item instructing the need for an amended K-1, Steiner had nonetheless testified that he had discussed the item with Petitioner. Resp. 17. Such is not true; at best Steiner could testify that he merely believed he *may have* (emphasis added) done so.

REPLY TO RESPONDENT'S THIRD ARGUMENT

In attempting to respond to Petitioner's argument regarding the error committed by the trial court in refusing to allow the expert witness Steven Conway to testify, Respondent does not respond. After again erroneously representing to this Court that Steiner had testified that he had informed Petitioner of the need for an amended Schedule K-1, Respondent writes that Conway's testimony was excluded on relevancy grounds. Resp. 18. Despite Respondent's attempt to characterize what the testimony of Conway would have been, a proffer is on the record and Petitioner refers this Court to his offer of proof as to what that testimony would have truly been. Pet. A-23.

Petitioner's point is that Conway's testimony was improperly excluded by the trial court on the stated basis of Federal Rule 608(b). Pet. 22-30. Respondent does not even refer to said Rule in its Argument, nor does Respondent make an effort to distinguish the case of *United States v. Abel,* 469 U.S. 45 (1984).

CONCLUSION

For the reasons set forth in his petition for a writ of certiorari, Petitioner respectfully requests that said petition be granted.

Respectfully submitted,

BYRON FOX
Petitioner's Counsel of Record

FOX & PARTEE
4600 Madison, Suite 1010
Kansas City, MO 64112
(816) 531-3500

OF COUNSEL

CARL W. BUSSEY
906 Grand, Suite 1031
Kansas City, MO 64106
(816) 474-3440